FILE COPY.

FILED
NOV 23 1905
JAMES H. McKENNEY,
Clerk.

(19,463.)

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1905.

## No. 91.

FRED H. KOLZE, Administrator of the Estate of Friedrich Kolze, deceased, LINA KOLZE, LOUISA KOLZE et al.,
*Appellants,*

*vs.*

CHARLOTTE E. HOADLEY,
*Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

# BRIEF AND ARGUMENT FOR APPELLEE.

HERMAN W. STILLMAN,
Solicitor for Appellee.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

## No. 91.

FRED H. KOLZE, Administrator of the Estate of Friedrich Kolze, deceased. LINA KOLZE, LOUISA KOLZE et al., *Appellants*,

*vs.*

CHARLOTTE E. HOADLEY, *Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

## BRIEF AND ARGUMENT FOR APPELLEE.

MAY IT PLEASE THE COURT:

In appellants' statement, many of the dates, and other particulars which seem necessary to an understanding by this court of the position of the parties, and which have a controlling effect upon the jurisdictional question presented, are omitted. Chronologically arranged, the important facts in the case are as follows:

*First:* Friedrich Kolze sold and conveyed certain real estate to Day, by deed dated and acknovledged NOVEMBER 15, 1897, and recorded NOVEMBER 23, 1897.

*Second:* Day executed the trust deeds described in the amended bill, to Stade, as trustee, dated NOVEMBER 17, 1897, acknowledged and recorded NOVEMBER 24, 1897, securing his notes for part purchase money of said premises.

*Third:* Kolze thereupon entrusted the notes and trust deeds to Stade for safe keeping, the notes being executed by Day to his own order, and by him endorsed in blank.

*Fourth:* On FEBRUARY 17, 1898, Stade took the notes, and the trust deeds securing the same, and pledged them as collateral security to the note of said Stade, upon which the appellee then advanced or secured to be advanced a large sum of money.

*Fifth:* By deed dated and acknowledged NOVEMBER 23, 1897, and delivered and recorded JUNE 30, 1898, Day reconveyed said premises to Kolze.

*Sixth:* By release deed, dated and acknowledged OCTOBER 27, 1898, and RECORDED OCTOBER 29, 1898, Stade, as trustee, released the trust deeds to Kolze, said release deed reciting that the same was made for and in consideration of one dollar, and for other good and valuable considerations, and further reciting that the notes secured thereby had been canceled. (Rec., 40.)

*Seventh:* By deed dated OCTOBER 29, 1898, Kolze, now deceased, and the appellant, Lina Kolze, his wife, conveyed said premises to the appellant, Louisa Kolze, who was not a *bona fide* purchaser, and who took the premises charged with the lien of said trust deeds.

*Eighth:* Thereupon Louisa Kolze executed a trust deed, ostensibly to secure Ten Thousand Dollars ($10,000) of part purchase money, to the appellant, Percy V. Castle, as trustee, the appellant, Arista B. Williams, being named as successor in trust, which trust deed was dated October 27, 1898, acknowledged October 28, 1898, and recorded October 29, 1898; the defendant, Fred H. Kolze, as administrator of the estate of Friedrich Kolze, deceased, being the owner of said notes and trust deeds, subject, however, to the rights of the appellee.

*Ninth:* Subsequently, on or about April 21, 1899, the notes and trust deeds of Day, upon default by Stade in the payment of his note, were sold, in accordance with the terms of the collateral note, and were bid in by, and became the property of, the appellee.

The date of the deed from Day back to Kolze, and of its acknowledgement,—the same as the date of record of the deed from Kolze to Day,—discredits the *bona fides* of the original purchase by Day, and clearly indicates the fact, namely, that the purchase was colorable, so far at least as Day and Stade were concerned, for the purpose of issuing the notes and trust deeds of Day for fraudulent manipulation. It is perhaps only fair to state that in the original transaction Kolze himself appears to have acted in good faith. His subsequent conduct, in procuring the release deed from Stade, and conveying to his daughter, with the evident purpose of evading the lien of the incumbrances, while perhaps entitled to be charitably considered, cannot be justified.

Upon this state of facts, this proceeding was insti-

tuted by the appellee, to set aside the release deed as fraudulent, and to foreclose the incumbrances.

Prior to the filing of the amended bill, with which this record begins, answers were filed by the appellants, to which replications were filed, and the cause was referred to Master in Chancery William M. Booth, who made his report, recommending a decree in favor of appellee, to which report exceptions were filed by the appellants, which were argued and overruled by the court, as appears from the decree. (Rec., 38.)

Thereupon, the amended bill was filed, as shown in this record, more fully outlining the transactions between the parties.

After the filing of the amended bill (the original bill containing no other or different jurisdictional matters), appellants filed their written MOTION TO DISMISS THE SUIT, for the reason alleged, that it does not appear that the proper diversity of citizenship exists between FRIEDRICH KOLZE, alleged in said amended bill to have been the original owner of said notes and trust deeds, "or said CHARLES E. STADE, therein alleged to be his trusted agent in the premises, the assignors" of said appellee, and the defendants or any of them. This motion was overruled February 8, 1904.

On February 25, 1904, the appellants filed their PLEA OF WANT OF JURISDICTION, alleging that said suit was brought by appellee AS ASSIGNEE OF ONE WILLIAM P. SMITH. In this plea appellants set up the hypothecation of the notes by Stade with Smith, or some person acting for him, to secure the note of Stade, and a

certain contract made by him, and that upon the failure of Stade to pay his note and carry out his contract, said mortgage notes and trust deeds signed by Day were sold on or about April 21, 1899, and were bid in by and became the property of the appellee. That said STADE AND SMITH, "the successive assignors" of appellee, were and still are, citizens of Illinois, the same state of which Day was and is a resident.

On April 5, 1904, the plea of appellants was argued, and held by the court to be insufficient, and the defendants were ruled to answer the amended bill. On May 25, 1904, the decree was entered, defaulting the appellants for want of answer, and granting the relief prayed.

It will be noted that in the motion to dismiss, the appellants took the position that KOLZE and STADE were appellee's assignors, while in their plea they claim that STADE and SMITH were her assignors.

Appellee's position is that she derived the notes from KOLZE, through Stade, to whom they had been entrusted, with the indicia of ownership.

STADE was not an assignor of the notes, because he never owned them, or had any interest in them, and could never have brought suit upon them, to recover their contents from Day, the maker. This sufficiently appears from the allegations of the amended bill of complaint. (Rec., 11.)

SMITH was not an assignor, because he also never owned them. He appears, from the plea, to have been interested in having the note and undertakings of Stade satisfied by sale of the collaterals, but the collaterals never became vested in him, and he never

could have maintained an action thereon. His part in the transaction was not mentioned in the amended bill of complaint, nor in the decree entered upon the master's report.

For the purposes of this appeal, the situation of the parties (which is a question of fact, and of legal effect arising from their conduct, apart from the question of jurisdiction), must be assumed to be as alleged in the amended bill of complaint and found by the decree, viz., that the appellee derived the notes and trust deeds from Kolze, who was the only owner of the notes prior to their ownership by the complainant.

KOLZE, however, after the hypothecation of the notes and trust deeds by Stade, had accepted a reconveyance from Day, and had procured a release of said trust deeds, by release deed, which recited that the indebtedness had been paid and the notes canceled. Kolze would certainly be bound by these recitals, and precluded from prosecuting any action against Day.

THEREAFTER, the notes and trust deeds were sold under Stade's collateral note, and became the property of appellee. So that AT AND EVER SINCE, the time that appellee derived title to said notes and trust deeds, no one intervened between the appellee and Day, the maker of the notes, for the reason that no suit could have been brought upon them by Kolze, if they had not been sold under the collateral note, and acquired by appellee, because, as between Day and Kolze the notes had been satisfied.

Furthermore, while Day was made a party defendant as a proper, although not a necessary, party, nevertheless the relief sought, and the relief granted, namely,

the setting aside of the release deed, and the foreclosure of the trust deeds, was sought and granted against Kolze, or those claiming under him with notice of appellee's rights.

Day had no interest in the premises and was dismissed from the suit upon appellee's motion.

No relief was awarded to the appellee against him.

It is a suit by appellee against KOLZE (or those claiming under him with notice), who had acquired the title to the premises, and between whom and the appellee there is no intermediate party.

# BRIEF.

## I.

"The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the Federal Courts."

In construing the statute in question the courts will look to the spirit of the act, and will consider the real relation of the parties, and if it appears from all the circumstances that the assignment could not have been colorable for the purpose of conferring jurisdiction, then, the reason of the restriction being gone, the jurisdiction of the United States Courts will attach.

*Holmes* v. *Goldsmith*, 147 U. S., 150.

*Farmington* v. *Pillsbury*, 114 U. S., 138.

*Chase* v. *Sheldon Roller-Mills Company*, 56 Fed. Rep., 625.

## II.

The restriction against suits by assignees of promissory notes or choses in action in United States Courts, "*unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made*," has reference to diverse citizenship only. No disqualification of the assignor, other than want of diverse citizenship, will prevent suit by the assignee.

*Chase* v. *Sheldon Roller-Mills Company*, 56 Fed. Rep., 625.

*Bowden* v. *Burnham*, 59 Fed. Rep. (C. C. A.), 752.

The inability of Kolze, the assignor, to prosecute suit against Day, the maker, by reason of the fact that as between Kolze and Day the debt had been paid, so that Kolze could not have sued in the United States Court, *or in any court,* would not be an element in the disqualification, if any, of Kolze's assignee, under the statute quoted.

III.

The language of the act, above quoted, implies, in order that the denial of jurisdiction at the suit of an assignee shall apply, that, but for the assignment, a claim would exist on the part of the assignor against the original debtor. When a claim would not exist on the part of the assignor, had no assignment been made, the reason of the act will be wanting, and jurisdiction will attach.

*Holmes* v. *Goldsmith,* 147 U. S., 150.

*Wachusett National Bank* v. *The Sioux City Stove Works,* 56 Fed. Rep., 321.

*Chase* v. *Sheldon Roller-Mills Company, supra.*

Jurisdiction depends upon the status of the parties at the commencement of the suit.

*Emsheimer* v. *New Orleans,* 186 U. S., 33.

In the case at bar, at the commencement of the suit, no action could have been brought upon the notes and trust deeds by any person whomsoever, if no assignment had been made; not for want of diverse citizenship, but because, as between Kolze and Day, the debt had been satisfied and the trust deeds released. Kolze had been eliminated from the transaction as an assignor, within the contemplation of the statutes.

## IV.

The Circuit Court of the United States has jurisdiction of a suit brought by the endorsee of a promissory note against his immediate endorser, whether a suit would lie by the endorser against the mortgagor or not, upon the ground that the endorsee does not claim through an assignment, but upon a new contract between himself and the endorser.

*Young* v. *Bryan*, 19 U. S., 6 Wheat., 146.
*City of Superior* v. *Ripley*, 138 U. S., 93.

In this case, such a new contract was made when the complainant advanced her money upon the pledge of the mortgages, and that contract is still subsisting until the mortgages shall be realized upon.

Kolze, or those claiming under him, with notice, were the principal defendants, between whom and the appellee no one intervened.

If the presence of Day, an unnecessary party to the foreclosure, prevented the exercise of jurisdiction, which is not conceded, the impediment was removed by his dismissal.

*Conolly* v. *Taylor*, 27 U. S., 2 Pet., 556.

## V.

Under the circumstances of this case the principal relief sought was the setting aside of the release deed. Having jurisdiction for that purpose, the court properly retained it for complete relief.

*Ober* v. *Gallagher*, 93 U. S., 199.
*Deshler* v. *Dodge*, 16 How., 622.

# ARGUMENT.

## I.

### THE ACTS RELATING TO SUITS BY ASSIGNEES. THEIR PURPOSE AND CONSTRUCTION.

Three acts have been passed relating to the enforcement of promissory notes and choses in action in the United States Courts, by assignees: namely, the Judiciary Act of 1789 (Section 11); the Act of March 3, 1875; and the Act of March 3, 1887, as corrected by the Act of August 13, 1888.

The provisions of these acts were thus stated by this court in the case of *City of New Orleans* v. *Quinlin*, 173, U. S., 191:

"By the eleventh section of the Judiciary Act of 1789, it was expressly provided that the Circuit Courts could not take cognizance of a suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been, except in cases of foreign bills of exchange. The Act of March 3, 1875 (18 Stat., at L. 470, Chap. 137), provided: 'Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange.' The restriction was thus removed as to 'promissory notes negotiable by the law merchant,' and jurisdiction in such suits made to depend on the citizenship of the parties as in other cases. *Tredway* v. *Sanger*, 107 U. S., 323 (27:582).

By the first section of the Act of March 3, 1887 (24

Stat., at L. 552, Chap. 373), as corrected by the Act of August 13, 1888 (25 Stat., at L. 433, Chap. 866), the provision was made to read as follows: 'Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.' "

In construing these acts, it has been the uniform holding of this court that the acts were designed to prevent the creation of jurisdiction in the United States Courts by the transfer of claims held by a citizen of the same state with the debtor to a citizen of another state, and furthermore that the spirit of the acts will be looked to in determining the question of jurisdiction.

The language of this court in decisions to that effect will be found in subsequent parts of this argument.

## II.

### LIMITATIONS OF THE RESTRICTION. ITS APPLICATION TO DIVERSE CITIZENSHIP ONLY.

In the case of *Chase* v. *Sheldon Roller-Mills Co.*, 56 Fed. Rep., 625, two notes for $300 and $700 each, had been executed by the defendant, an Iowa corporation, to the order of a Minnesota corporation, and assigned by the latter to the plaintiffs, who were citizens of Missouri. The plaintiffs also held a note for $1,187.10 made by the same maker to their order. These notes were joined in one suit in the United States Circuit

Court for the Northern District of Iowa. The point was made that the assignors of the two notes first mentioned could not have sued in the United States Court, for the reason that the aggregate amount due on said notes was less than 2,000. The court say:

"Literally construed, the language of the statute would seem to deny the jurisdiction, under such circumstances; but under the rule of construction laid down by the Supreme Court in *Holmes* v. *Goldsmith*, *supra*, and the cases therein cited, the true meaning of the restriction is to be sought by an interpretation of the purpose to be effected, and the evil to be remedied."

The court then observes that the restrictions as to amount, and that as to suits by assignees, are wholly separate and distinct; that in the particular of diverse citizenship an action thereon by the assignors would have been within Federal jurisdiction, and that therefore the statutory restriction did not apply. To the same effect is *Bowden* v. *Burnham*, 59 Fed. Rep., (C. C. A.), 752.

In the cases cited, the assignors could not have sued in the United States Courts, by reason of the amount involved. In this case, Kolze, the assignor, could not have sued there, or in any other jurisdiction, because he had satisfied the debt. In both cases, "literally construed, the language of the statute would seem to deny the jurisdiction"; but in the case at bar, as in the cases cited, interpretation of the act with reference to "the purpose to be effected and the evil to be remedied," does not lead to a denial of Federal jurisdiction of a suit by the assignee. In fact, in the cases cited, there would seem to be more reason for a strict interpretation than in this cause, for the reason that

in those cases there might have been a colorable assignment of the notes for the purpose of combining them with other claims in order to bring the cases within the requisite jurisdictional amount; while in the case at bar, there can obviously have been no fictitious transfer, as the assignor, or those claiming under him, are the principal defendants, and the only parties contesting the jurisdiction.

## III.

THE NECESSITY OF LIABILITY FROM THE DEBTOR TO THE ASSIGNOR (IF NO ASSIGNMENT HAD BEEN MADE), IN ORDER THAT THE RESTRICTION SHALL APPLY.

It is submitted, moreover, that the language of the act, "unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made," has in contemplation cases where there would exist a liability upon the part of the debtor to the assignor if no assignment had been made; and where, under the allegations of the pleadings, it appears that as between the debtor and the original creditor or assignor, the latter had become eliminated from the transaction by satisfaction by him of the debt, then, there being no possible party intermediate between the original debtor and the assignee, in whose interest the suit might be prosecuted, the reason of the act will be wanting, and the act will not apply.

In the case at bar, Day, the maker of the mortgages, had paid his debt by reconveyance of the property to Kolze. That this is so, is evidenced by the fact that

after accepting the reconveyance Kolze procured a release of the trust deeds from the trustee, and placed the same on record, reciting that the debt had been paid and the notes canceled. That recital, so far as the cancellation of the notes is concerned, was not true, and was not binding upon the appellee, who had acquired the notes. Under the circumstances, Day was not discharged, because he delivered his reconveyance and made satisfaction of the debt to Kolze without taking up his notes. But his liability was not to Kolze. And because Kolze could not have sued Day, had no assignment been made, the act under consideration has no application to this case.

That this is the correct interpretation to be placed upon the act would appear from the opinion of this court in the case of *Holmes et al.* v. *Goldsmith et al.*, 147 U. S., 150. In that case a promissory note had been executed by the plaintiffs in error (defendants below) to the order of one Owens, who endorsed the same to the defendants in error (plaintiffs below), and received the amount thereof. The complaint alleged that Owens, although the payee, was in fact a maker of the note and never himself had any cause of action thereon against the defendants. This court, Mr. Justice Shiras delivering the opinion, say:

"It is quite plain that the plaintiff's action did not offend the spirit and purpose of this section of the Act.

The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the Federal Courts. * * *

In *Bushnell* v. *Kennedy*, 76 U. S., 9 Wall., 387, 391 (19: 736, 738), *Chief Justice* Chase, in delivering the opinion of the court, said: 'It may be observed that

the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee; though it is not to be doubted that the holder's title could only be derived through transfer or assignment. So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. And it has also been determined that the assignee of a *chose in action* may maintain a suit in the circuit court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors.'

We do not overlook the fact that, since the foregoing cases were determined, Congress has, in the more recent judiciary acts, still further restricted the jurisdiction of the circuit courts by including in the prohibitory clause the case of promissory notes payable to bearer.

But the reasoning remains applicable, in so far as they hold that the language of the statute is to be interpreted by the purpose to be effected and the mischief to be prevented.

We think that the jurisdiction of the circuit court, in the case before us, was properly put by the court below upon the proposition that the true meaning of the restriction in question was not disturbed by permitting the plaintiffs to show that, notwithstanding the terms of the note, the payee was really a maker or original promisor, and did not, by his endorsement, assign or transfer any right of action held by him against the accommodation makers."

It is apprehended that the construction would have been the same, no matter by reason of what circumstances the endorser might have had no right of action against the makers.

At the time the mortgages foreclosed in this suit

were sold under the collateral note with which they had been pledged, Kolze had no right of action against the maker, and stands in the identical legal position with Owens, the payee in the note involved in the case above cited. By the negotiation of the instruments, Kolze became a guarantor of their validity until the debt for which they were pledged should be satisfied. After their release or discharge by his procurement, and to himself as the owner of the property by reconveyance from the mortgagor, he became in effect a maker to all intents and purposes, so far as concerns the lien of the mortgages upon the real estate embraced therein.

The case of *Wachusett National Bank* v. *The Sioux City Stove Works*, 56 Fed. Rep., 321, seems also to apply. In that case the defendant company executed notes to the order of the Union Loan and Trust Company, which endorsed them to the order of the plaintiff company, and after receiving the money on them paid it over to the maker of the notes. Under this state of facts, the plaintiff company held as assignee of the notes and under the strict letter of the act could not have maintained the suit. The allegations of the petition disclosed, however, that the transaction was really between the maker and such endorsee, and the jurisdiction of the court was upheld. No right of action existed on the part of the payee against the maker, hence there could have been no colorable assignment and the reason of the restriction was wanting.

The court say:

"There never was a time when the Trust Company could have maintained an action on the notes against the maker thereof, for it never advanced any money

thereon, nor did it ever agree or promise so to do, nor were the notes executed as evidence of an indebtedness arising out of any past transactions. * * * It was the payment of the money by the Wachusett Bank that created a right of action against the defendant, but this right of action never belonged to the Trust Company, and did not pass by assignment from it to the plaintiff bank."

In the case at bar there never was a time since the reconveyance to Kolze and the release of the incumbrances (which occurred prior to the date when appellee acquired the mortgages), when Kolze could have maintained an action on the notes against Day, the maker.

For the reasons above stated, it is submitted that appellee could have pursued Day in this suit, in the United States Circuit Court, to the full extent of his personal liability upon the notes, had she chosen so to do.

## IV.

### THE RIGHT OF AN ASSIGNEE TO SUE THE ASSIGNOR UPON A NEW CONTRACT.

As a matter of fact, however, all that appellee sought was a foreclosure of the property. Day was dismissed from the suit, and the only relief granted was the foreclosure of the property against Kolze, or those claiming under him. It will be noted that it is not Day who is objecting to the jurisdiction, but Kolze's wife and daughter, and the administrator of his estate. The claim of want of jurisdiction is not invoked by the original debtor, but by the original creditor or those claiming under him. This is a very material fact. The con-

troversy is obviously not between an assignee and the maker, but between an assignee and her assignor. The case would thus seem to be governed by the rule laid down in suits which have arisen, brought by the endorsees of notes against the endorsers. In that class of cases, where the necessary diversity of citizenship exists between the endorsee and the endorser, the jurisdiction of the United States Courts has been uniformly upheld, without regard to whether or not diversity of citizenship exists between the endorser and the maker. In these cases jurisdiction has attached for the reason that by the endorsement, a new contract was made between the endorser and the endorsee; a liability of the endorser to the endorsee apart from any liability of the maker to the endorser upon the original debt, existing without regard to the transactions between the maker and the endorser, and proceeding from the new and different contract between the endorser and the endorsee.

In the case of the *City of Superior* v. *Ripley*, 138 U. S., 93, an action was brought against the City of Superior upon certain orders drawn by contractors in favor of the plaintiffs and accepted by the city. It was contended that the plaintiffs obtained their right to bring suit upon the orders by assignment from the contractors, who were citizens of the same state as the defendant. The acceptance by the city was held by this court to be a new contract, and that the same rule would apply as governs the right of an endorsee of a note to sue his endorser, without regard to diversity of citizenship between the endorser and the maker. This court say:

"Ever since the case of *Young* v. *Bryan*, 19 U. S., 6

Wheat., 146, it has been the settled law of this Court that the Circuit Court has jurisdiction of a suit brought by the endorsee of a promissory note against his immediate endorser, whether a suit would lie against the maker or not, upon the ground, as stated by Chief Justice Marshall, 'that the endorsee does not claim through an assignment, but upon a new contract between himself and the endorser.' "

IN THE CASE AT BAR, KOLZE MADE A NEW CONTRACT WITH THE APPELLEE UPON THE HYPOTHECATION OF THE SECURITIES, NAMELY, THAT THE MORTGAGES PLEDGED AND THE PREMISES EMBRACED THEREIN SHOULD REMAIN AS SECURITY FOR THE DEBT TO THE APPELLEE UNTIL SUCH DEBT SHOULD BE PAID.

After this new contract by the hypothecation of the mortgages, which hypothecation was held by the court to be in effect the act of Kolze, the latter accepted satisfaction of the original debt to him from the maker. After that satisfaction, and the fraudulent release of the incumbrances by the trustee, who was the very man who was permitted by Kolze to negotiate the securities and obtain money upon them from the appellee, the securities were sold under the terms of the collateral note and were bid in by the appellee and taken by her in satisfaction of her just debt,—a debt which, in legal contemplation, existed from Kolze to herself.

As was said by counsel for the defendant in error, in the case of *Young* v. *Bryan*, 19 U. S., 146, which this court has recently followed, as above noted (referring to the language of the Act of 1789 then in force, which was similar to the present law):

"These words necessarily import a recovery by an assignee, claiming through the medium of an assignment, of the same contents which might have been re-

covered by the assignor, if he had not assigned. They apply only to a derivative claim." * * * "The contract," (*i. e.*, of an endorser) "is so entirely independent that the endorsee" (endorser?) "would be liable though the note were forged, or the drawer fictitious. The assignment, it is true, is evidence of the contract, and in a certain sense, the foundation of his claim; but he does not claim through it nor under it, nor does he claim at all as assignee."

In the case at bar, can it be doubted, under the circumstances set up in the amended bill of complaint, that even if Day, the maker of the notes and trust deeds, were a myth, or the notes and trust deeds were forged, they having been negotiated by Kolze, and he having become the owner of the premises embraced in the mortgages, this suit would lie directly against him or his grantee, on the part of appellee, in the United States Courts, to recover the premises by foreclosure? Kolze, in effect, assumed the encumbrances, so far as their lien upon the premises is concerned, and those claiming under him can not now sit back and enjoy the property, and say to the appellee, who has advanced her money on the faith of the mortgages; "You cannot foreclose against us in the United States Courts, because Kolze could not there have sued the maker, *had he not released him from his obligation.*"

Surely it cannot be contended that because he, Kolze, could not sue Day (*whom he had released*), in the United States Courts, that therefore the appellee could not sue him, Kolze, in the United States Courts upon this new undertaking. He reacquired the premises embraced in the trust deeds by conveyance from Day, and he, or his grantee with notice, must respond to the ap-

pellee with those premises to the extent of her debt. That is all that appellee seeks in this case. She voluntarily remitted all that part of the amount due under the mortgages, aggregating $7,569, over and above the amount of her debt or $2,850, to secure which, the securities were pledged. (Rec., 45.)

In assuming jurisdiction to award such relief upon the part of a citizen of Massachusetts against those claiming under Kolze, all of whom are citizens of Illinois, the fact that Day, the maker of the mortgages, was also a citizen of Illinois, and that Kolze could not have sued Day upon the notes in the United States Courts, *if he had not satisfied the debt*, was properly held to be immaterial, and to have no application.

## V.

THE JURISDICTION OF THE UNITED STATES COURT TO SET ASIDE THE RELEASE, AND TO RETAIN THE CASE TO GRANT FULL RELIEF.

But apart from the foregoing considerations, it is respectfully submitted that the case at bar is not within the prohibition of the statute, for the reason that it is not a suit primarily to recover the contents of promissory notes. The bill is a bill to remove the cloud of the fraudulent release deed. It was with regard to whether or not the release was fraudulent that the voluminous testimony was taken by the master in the case. Ample relief might have been awarded to the complainant by declaring the release deed fraudulent and reinstating her mortgages. Such relief would not have been a recovery of the contents of the notes.

Chief Justice Marshall in *Sere* v. *Pitot*, 6 Cranch., 332, said that "the contents of a note are the sum it shows to be due"; and in *Barney* v. *Globe Bank*, 5 Blatch., 107, the court say:

"The word contents is easily understood, when applied to these instruments. It designates the specific sums named therein, and payable by the terms of the instruments themselves."

The relief by the removal of the cloud was certainly not a recovery of the amounts payable under the notes; and relief by foreclosure was simply ancillary to such relief.

In *Ober* v. *Gallagher*, 93 U. S., 199, this court held that a suit brought after a judgment had been rendered upon certain notes was not brought to recover the contents of the notes, and a foreclosure of the judgment lien was permitted; the court furthermore drew to itself jurisdiction to decree foreclosure of other notes secured by the same lien.

In *Deshler* v. *Dodge*, 16 How., 632, an action of replevin brought by an assignee of notes, to recover possession thereof, was held to be not a case to recover the contents of the notes, and that it was not within the prohibition of the statute. That case is analogous to the case at bar in this respect: that in the case at bar, by the fraudulent release, the complainant in effect was kept out of the enjoyment of her mortgages, which she must first restore to their legal standing by a decree setting aside the release deed.

The case of *Blacklock* v. *Small*, 127 U. S., 96, upon which appellants rely, in anticipation of this proposition, does not apply, for the reason that in that case the property was still owned by the mortgagor, and

FILE COPY.

(19,463.)

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

## No. 91.

FRED H. KOLZE, Administrator of the Estate of Friedrich Kolze, deceased, LINA KOLZE, LOUISA KOLZE et al., *Appellants*,

*vs.*

CHARLOTTE E. HOADLEY, *Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

## PETITION OF APPELLEE FOR REHEARING.

HERMAN W. STILLMAN,
Solicitor for Appellee.

THE GUNTHORP-WARREN PRINTING CO., 118 RANDOLPH STREET, CHICAGO

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

## No. 91.

| | |
|---|---|
| **FRED H. KOLZE, Administrator of the Estate of Friedrich Kolze, deceased, LINA KOLZE, LOUISA KOLZE et al.,** *Appellants,* *vs.* **CHARLOTTE E. HOADLEY,** *Appellee.* | Appeal from the Circuit Court of the United States for the Northern District of Illinois. |

## PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

The appellee very respectfully petitions for a rehearing of this cause upon the grounds hereinafter set forth.

The first and third grounds are by way of suggestion, with a view to a modification of the judgment or decree of this court, in respects which it is thought are not inconsistent with the views of this court on the main question, and which seem just and equitable between the parties.

As to the second ground, the points contained therein

were made on page 5 of appellee's statement of the case, but were not argued at greater length. Perhaps these points should have been amplified and more clearly presented.

First. After the filing of the original bill, which contained no other or different jurisdictional questions than are contained in the amended bill, (as stipulated in this record), the defendants answered, denying the genuineness of appellee's notes, and denying fraud in the release deed. The case was referred to Master in Chancery Booth, who took a large amount of testimony, and who reported upon the issues in favor of the appellee. The master's report was filed May 25, 1903. (Rec., 38.)

The master's fees under that reference were $380, as appears by the decree (Rec., 42), which appellee paid. Exceptions were filed by the appellants upon the merits of the case. Those exceptions were argued before his Honor, Judge Kohlsaat, and were overruled. (Rec., 38.)

Up to this point no question had been raised as to the jurisdiction of the court by anyone connected with the case.

A decree was drafted in conformity with the rulings of the court, upon the presentation of which the defendants filed their motion January 14, 1904, and afterwards filed their plea in the case.

Under these circumstances it seems a great hardship to oblige appellee to go to a state court and make up issues on these same facts concerning the identity of her notes and the fraud in the release.

Appellee respectfully urges that, in any view of the case, even though the appellee were forbidden by the statute to foreclose the incumbrances in the United States Court, her bill should not be dismissed, but she should be permitted to amend the same, if necessary, and to have a decree removing the cloud of the release deed, and establishing her notes as the genuine notes secured by the trust deeds, thus allowing her to conduct a much less expensive suit in the state court in the foreclosure of the incumbrances.

SECOND. As her second ground for a rehearing, appellee most sincerely urges that this court has apparently misapprehended the position of the parties, as affecting the jurisdictional question presented by the record. This court say, in the opinion filed herein (bottom of page 4), that

"It would seem to be immaterial whether the plaintiff derived her title directly from Stade, to whom she had advanced money and afterwards purchased the notes and trust deeds, as alleged in the bill, or through William P. Smith, who had obtained the notes and trust deeds from Stade, his debtor, since both Stade and Smith were citizens of the State of Illinois, and the inhibition of the statute would apply in either case."

And again, (bottom of page 5):

"As the plaintiff is thus compelled to trace her title through Stade or Smith, who are both citizens of Illinois, and neither of whom could have prosecuted this suit, she is affected by the same incompetency."

It is in this view of the derivation of appellee's title either from Stade or Smith, that it is most earnestly submitted that this court has misconceived the true position of the parties. Appellee therefore craves the indulgence of this court, and bespeaks consideration

of the following statement, which is believed to be borne out by the facts of the case and the decisions of this court applicable thereto.

1. *The appellee did not derive her title from Stade, who had no title to give.*

The notes had been entrusted by Kolze to Stade, his agent, endorsed in blank, transferable by delivery, and the act of Stade in pledging them, and the trust deeds securing the same, was, in contemplation of law, *the act of Kolze himself.* His act, being that of a *mere agent,* with no title or ownership in the notes, was the act of Kolze, his principal.

Stade never owned the notes and *could never have prosecuted suit thereon,*—a right and qualification which must have existed in him, in order to affect the appellee, under the letter and reason of the Act upon which appellants rely.

The facts seem governed by the reasoning of this court in *Bank of Pittsburgh* v. *Neal,* 22 How., 96, in which this court say:

"Where the party to a negotiable instrument intrusts it to the custody of another with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carried on its face an applied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody,—or, in other words, *it is the act of the principal,* and he is bound by it."

And as was stated by this court in *Michigan Insurance Company* v. *Eldred,* 9 Wall., 544:

"It is well settled law that where a party to a negoti-

able bill of exchange or promissory note containing blanks, intrusts it to the custody of another, whether the blanks are in the date or the amount of the note, and whether it be for the purpose of accommodating the person to whom it was intrusted, or to be used to raise money for his own benefit, such bill or note, especially if it be endorsed in blank, or is made payable to bearer, carries on its face an implied authority, in the person to whom it is so intrusted, to fill up the blanks in his discretion; and, as between such party to the bill or note and innocent third parties, holding the bill or note as transferees for value, in the usual course of business, the person to whom it is so intrusted must be deemed to be the agent of the party who committed such bill or note to his custody; and the legal conclusion is, that in filling up the blanks he acted under the authority of that party, and with his approbation and consent."

As Stade had no title of his own to give, and as his act, upon this line of reasoning, which would seem to apply, was the act of Kolze, then in legal contemplation *Kolze pledged the papers,* through Stade, his agent, to secure the note of Stade. The appellee did not acquire the title of Stade to the notes upon the sale, because Stade had no title to be acquired. She derived the title of Kolze, who was her assignor, through Stade, his agent.

2. *Appellee did not derive title from Smith.*

In the statement of the case, preceding the opinion (page 1), this court say:

"On February 17, 1898, Stade took the notes and trust deeds securing the same and pledged them to Charlotte E. Hoadley as collateral security to his own notes, upon which Hoadley then advanced, or secured to be advanced, a large sum of money."

With this finding, the recital of the opinion hereinbefore quoted, referring to appellee's tracing title

through *"William P. Smith, who had obtained the notes and trust deeds from Stade, his debtor,"* seems inconsistent. Smith certainly did not obtain the notes from Stade. The appellee certainly did not obtain the notes from Smith.

The only mention of Smith in this record is contained in appellant's plea. But it is not even alleged in the plea that the notes and trust deeds were deposited with William P. Smith, or that he sold or assigned them to the appellee. The allegation is that they were deposited with him, *or some person or persons acting for him,* to secure Stade's note payable to the order of Smith, "and also to secure said William P. Smith for the faithful performance by said Stade of a certain contract"; it does not allege that Smith then owned the note of Stade for $1,000, or that it was not owned by the appellee; it alleges that Stade failed to pay the note, but it does not say *to whom,* and failed to carry out his contract, and that Smith *caused* the collaterals to be sold. The plea recites, it is true, that said suit is brought by plaintiff "as assignee from one William P. Smith," and it refers to Smith, by way of recital, as the assignor of plaintiff, but it does not state of what, and it does not state facts showing *how* Smith was her assignor of anything, or *how* the plaintiff acquired the notes from Smith. The allegations are mere conclusions of the pleader, and from the entire plea taken as a whole it can only be inferred that Smith had some interest in the pledge of the collaterals, but nothing more.

Furthermore, the "plea" is not supported by the affidavit of a defendant that the same is true in point of fact, as required by equity rule 31, and it is submitted

that it amounted to nothing more than a further motion or suggestion to the court that the court had no jurisdiction.

It is believed to be well settled that the want of certificates of counsel ~~are~~ held to have been waived by setting down a plea and demurrer thereto, for argument as to the sufficiency of the plea; but a careful search of the decisions has revealed no case holding that the want of an affidavit *to the truth* of a plea setting up matter *in pais*, required not only by the rules, but by general chancery practice, can be waived.

The rule in that behalf is thus stated in Daniel's Ch. Prac., *688:

"Where a plea which ought to be upon oath is put in without one, the irregularity is not one which can be waived by the plaintiff's taking any proceeding upon it." Citing

*Wall* v. *Stubbs*, 2 V. & B., 354, 358.

In that case the plaintiff set the unverified plea for argument. It was argued that the plaintiff was under the necessity of setting down the plea within eight days, otherwise he would have admitted its validity. The court say:

"The second point, that the plaintiff, having taken a step, recognizing the plea as regular, by setting it down to be argued, has waived this objection, is put thus; that this rule, requiring the plea to be put in upon oath, is entirely for the benefit of the plaintiff; who, if that is so, may certainly waive it; and this is compared to the case of a plaintiff abroad, required to give security for costs; but a plea of this nature stands precisely upon the footing of an answer. In both instances the oath of the defendant is for the benefit of the plaintiff certainly, but is also prescribed by the established course of the court, if not dispensed

the relief sought was evidently a decree against him, for the recovery of the debt. Furthermore, a part owner of the mortgage, a citizen of the same state as the mortgagor, and who should have been a complainant, was made a defendant. In the case at bar, no relief was sought against the mortgagor, as evidenced by his dismissal from the suit, and substantial relief might have been awarded by the removal and setting aside of the release deed, as against the grantee of Kolze, with notice, without the ancillary relief of foreclosure which was properly granted.

We submit that in any view of this suit it does not come within the spirit or intendment of the prohibition contained in the act upon which the motion and plea were based, and that the Circuit Court properly entertained jurisdiction to grant the relief accorded by the decree.

Respectfully submitted.

HERMAN W. STILLMAN,
*Solicitor for Appellee.*